

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD C. BELOTE
Claimant

VS.

SUB-CONTRACTORS, INC.
Respondent

AND

AETNA CASUALTY & SURETY CO.
Insurance Carrier

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Docket No. 167,996

ORDER

Claimant appeals from an Order dated June 10, 1998, entered by Administrative Law Judge Jon L. Frobish that denies claimant's request for post-award medical treatment.

ISSUES

The issues claimant raises on appeal all deal with his request for medical treatment. The ALJ based his denial of medical benefits on claimant's failure to prove the requested medical treatment was for a condition caused by the May 1, 1992 injury and also a failure to prove that additional medical treatment was necessary. The Appeals Board must first determine whether the ALJ's Order is a post-award preliminary hearing order or a final order and, if it is a preliminary hearing order, what the Appeals Board's jurisdiction is to hear this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

An ALJ may conduct a preliminary hearing as a part of a post-award review and modification proceeding.

The Appeals Board has on many occasions approved the use of the preliminary hearing procedures as a part of a post-award application for review and modification. The

Board has done so in many cases based largely upon the fact that the trial court and the parties treated the proceedings as a preliminary hearing.

Although the preliminary hearing statute, K.S.A. 1997 Supp. 44-534a, does not specifically provide that this is also a procedure to be used post-award, there is, however, other statutory authority for a post-award preliminary hearing. In Andrews v. Blackburn, Inc., Docket No. 158,135 (July 1996), the Appeals Board, for several reasons, concluded that the preliminary hearing procedure may be used in a post-award proceeding. First, the language of K.S.A. 1997 Supp. 44-534a was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate that the final award would supersede any preliminary hearing order. An application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 1995 Supp. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 1997 Supp. 44-551(b)(2)(C) authorizes the use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a long standing practice that has existed and been followed by the Division and by practicing attorneys generally. The practice is consistent with the statutory scheme of the Act and applicable policy considerations. The ALJ did not exceed his jurisdiction in this case by conducting a preliminary hearing as a part of a post-award application for medical treatment proceeding.

The Board recognizes that there is some confusion concerning what procedure is to be followed post-award in proceedings involving medical benefits. Typically, an award will provide for future medical benefits upon application to and approval by the director. Unfortunately, neither the Act nor the regulations set out what form that application should take. An attempt was made this past legislative session to implement such a procedure statutorily. That bill, however, was not enacted. Absent some statutory or regulatory change, or guidance from an appellate court, the Appeals Board will continue to follow its policy of treating post-award applications for medical treatment as preliminary hearings where the matter was heard pursuant to a Form E-3 Application for Preliminary Hearing and the preliminary hearing procedures were followed; but as a final order where the matter came before the ALJ on a motion and preliminary hearing procedures were not followed.

This matter came on for hearing before the ALJ pursuant to claimant's filing of a Form E-3 Application for Preliminary Hearing. That the parties treated the medical treatment issue as a preliminary hearing is further evidenced by the fact that the

applications for preliminary hearing were preceded by the notice of intent letters mandated by the preliminary hearing statute, K.S.A. 1997 Supp. 44-534a. Also, the medical evidence was introduced into the hearing record without foundation as is permitted for preliminary hearings by K.A.R. 51-3-5a. In addition, the parties' briefs to the Board describe the June 9, 1998 hearing as a preliminary hearing, as does the hearing transcript itself. Moreover, at the outset of the hearing, the ALJ announced: "We're here on what I believe is a post award preliminary matter, is that right?" This was answered in the affirmative.

Because the claimant's application concerning post-award medical treatment was treated as an application for preliminary hearing, the Appeals Board does not have jurisdiction to consider claimant's argument that the evidence does not support a finding that claimant is in need of medical treatment.

K.S.A. 1997 Supp. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. This includes specific jurisdictional issues identifying K.S.A. 1997 Supp. 44-534a. Whether claimant's condition is the result of the work-related injury is the equivalent to the issue of whether the injury arose out of and in the course of claimant's employment with respondent. This issue is jurisdictional under K.S.A. 1997 Supp. 44-534a. But, in this case the ALJ also made a finding that the evidence failed to show a need for medical treatment. This is not an issue the Appeals Board has jurisdiction to consider. Thus, the jurisdictional issue has been rendered moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish, dated June 10, 1998, remains in full force and the claimant's application for review of that Order should be, and the same is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: Robert E. Shaver, Wichita, KS
William L. Townsley, III, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director